

98-120
EX PARTE OR LATE FILED

ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

MSTV

January 11, 1999

1776 Massachusetts Ave., NW
Suite 310
Washington, DC 20036

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Suite 8B-201
Washington, DC 20554

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Margita E. White
President

Dear Chairman Kennard:

According to trade press accounts, you told a January 7 press conference that the FCC should not rush in with regulations on DTV must-carry because "it's not appropriate to preemptively say how the marketplace takes shape".

The word "preemptively" in this context seems particularly ironic since delay in the adoption of these rules in effect preempts the mandate of Congress in Section 614 of the Communications Act that the FCC apply its cable carriage rules to DTV signals promptly after its adoption of technical standards for such signals — action which the Commission took two years ago. Moreover, delay also preempts the Commission from acting on the voluminous record in this proceeding that includes far more than must-carry.

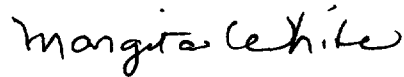
Most importantly, the fact is that the broadcast/cable marketplace has never been a "free marketplace" and that, by not acting promptly on must-carry, the Commission itself likely will preempt a marketplace for digital broadcast television.

Mr. Chairman, it certainly is true that how digital television will unfold is not known at this time. But that fact has not daunted or held back the Commission's efforts to establish a regulatory regime for other aspects of digital operations, subject, wisely, to periodic reviews. Moreover, as we discussed at our meeting with you on November 12, 1998, no one has explained how the various ways in which "the marketplace takes shape" would affect carriage requirements. As with its other DTV regulations, the FCC can and should engage in periodic reviews of how the initial regulations should be adapted to evolving market conditions.

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MSTV urges you to review the many pleadings in this proceeding that forcefully document the urgency of prompt adoption of cable carriage rules, including MSTV's capacity-based proposal. I attach herewith a summary of our position which accompanied our recently-filed reply comments.

Sincerely,

A handwritten signature in cursive script that reads "Margita E. White".

Margita E. White

Enc.

cc: CS Docket No. 98-120
The Honorable Harold Furchtgott-Roth
The Honorable Susan Ness
The Honorable Michael K. Powell
The Honorable Gloria Tristani

MEW/kjpt

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Carriage of the Transmissions)
of Digital Television Broadcast Stations)
)
Amendments to Part 76 of the Commission's Rules)
)
TO: The Commission)

CS Docket No. 98-120

EX PARTE OR LATE FILED

REPLY COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.

SUMMARY

Digital television has long been envisioned as a replacement service for the public's current analog service. To put teeth into the transition to digital, Congress mandated that broadcasters give back their analog spectrum in 2006, or whenever the transition is sufficiently far along. Congress also charged the Commission with managing the transition in the public interest. Since the early 1990's, the Commission has sought comment on DTV implementation rules, and since then, it has adopted rules on build-out, simulcasting, hours of operation; the list goes on. One of the most fundamental set of implementation issues involves cable carriage of DTV signals. In recognition of their importance, the Commission asked for comment on those issues as early as 1991, and in 1992, Congress set guidelines for the core regulatory principle and the schedule. Now it is time – indeed it is past time – for the Commission to abide by the Congressional mandate and adopt appropriate rules.

The Congressional cable carriage directive was clear as to timing: initiate the cable carriage rulemaking proceeding when the DTV transmission standard is adopted (almost two years ago to the day). Congress' sense of urgency, which has seemingly been forgotten, was unmistakable. Congress was also clear as to the principle: adopt a must-carry rule for digital television.

The broadcast/cable marketplace has never been a "free marketplace" – not with compulsory licenses, spectrum allocations, and heavy reliance by both services on radio frequencies licensed to them by the federal government. Under the regulatory environment in existence at the time the must-carry rules were adopted, cable systems could pick up and retransmit broadcasters' programming, at little or no cost and without broadcaster consent, and move their signals from large city to small hamlet at the risk of

destroying the bedrock values of localism that underlie Section 307(b) of the Act – ubiquitous and community-oriented service available to rich and poor, urban and country dweller alike.

In the analog environment, the Commission, Congress and the courts all embraced a series of regulations that promoted the growth of cable but sought as well to preserve the public's local television service from cable-induced erosion. That was at a time when cable was a smaller industry and policy makers were concerned about the strength of broadcasting with its reach into 98% of American homes. Yet Congress recognized even then the power and incentive of an untrammelled cable industry to undermine first smaller broadcasters and ultimately the whole system.

Today the tables have turned. Cable penetrates 70% of American homes and passes another 20%, while penetration of the sets needed to receive the replacement digital broadcast service understandably is nil. Cable's bottleneck strength is now probably the single greatest concern in the communications policy arena. Cable must-carry rules were demonstrated, to the Supreme Court's satisfaction, to be needed in the old analog environment when the shoe was on the other foot. How much more clearly are they necessary in the new digital environment?

Still, cable advocates urge delay. Wait until the patient is dead, they say to the Commission, before you administer first aid. They say: "That is what the Constitution requires." These reply comments of the Association for Maximum Service Television, Inc. ("MSTV") parse those particular arguments and demonstrate their failings. Fortunately, efforts to import into the Constitution meanings that don't make any sense rarely prevail.

It is, of course, true that how digital television will unfold is not known at this time. But that fact has not daunted or held back the Commission's efforts to establish a regulatory regime for other aspects of digital operations, subject, wisely, to periodic reviews. Further, none of the carriage rules MSTV endorses would constrain or be affected by how the digital service evolves, such as what percentage of their schedules broadcasters devote to HDTV and what percentage to multicasting, to take one area of uncertainty often cited as a reason for the Commission not to act. Non-degradation, network nonduplication, syndicated exclusivity, program guide regulation and must-carry principles can and should be established now, regardless what HDTV/multicast mix develops in response to consumer demand.

Some argue that delay is necessary to determine whether broadcasters' digital programming merits must-carry treatment. But carriage rules have never been based on the content of broadcast programming (but instead on the nature of the service – free, local and universal), and they would be constitutionally suspect if they had. Moreover, this argument neglects the fact that digital is a replacement service for the public's current analog service. Because that service has been subject to the regulatory principles at issue in this proceeding, the presumption should be to apply those principles to the replacement digital service, making adjustments as appropriate.

Cable's advocates have also confused two different concepts: the need for regulatory certainty now and the question of when the various carriage requirements should become effective. Broadcasters are, uniquely, embarked on a high-risk, high-cost (\$16 billion) transition. They need to know now which rules of the road that govern their established analog service will apply to the infant replacement DTV service, and when and

how. There is every reason for the carriage rules, other than must-carry, that MSTV's initial comments discussed in detail, to be made immediately effective. Even the cable industry, by and large, has not contested this proposition. The Commission should proceed forthwith to adopt them.

In the case of must-carry as well, rules should be adopted immediately. Markets abhor regulatory uncertainty and do not function effectively in such an environment. But the must-carry principle can take effect in stages. The keys are adoption now and an effective and fair implementation schedule over time.

Having led the 20-year struggle to give the public's free television service the opportunity to participate in advanced television, MSTV has been dismayed by the two-year neglect of the important issues at stake in this proceeding. Delay and indifference threaten the constructive industry/government partnership that has brought us to the brink of digital success – a partnership that cable started off participating in but which, sadly, it has abandoned.

MSTV recognized that the Commission's inertia was due to the confusion, noted above, between the need promptly to adopt a must-carry requirement and concern about the disruptive consequences of implementing must-carry across-the-board on day one, regardless of the circumstances in each market and of each station and system. To break the logjam so that the Commission could expeditiously resolve the whole set of carriage and compatibility issues, MSTV's Board in September voted to submit to the Commission a capacity-based, must-carry proposal. MSTV outlined that proposal on pages 51-56 of its initial comments.

Under this proposal cable systems would have to carry local digital signals when they add capacity, thereby avoiding the need to take away existing cable programming from their subscribers – this argument being the most compelling basis for cable's opposition to must-carry. This principle would be adjusted (1) where the cable system already has converted to digital or has added substantial capacity; (2) where in the future a cable system adds capacity, places early-adopter DTV stations on its system and keeps later adopters, *e.g.*, smaller stations, off the system; and (3) where a cable system simply stalls indefinitely in adding capacity that would accommodate DTV broadcast signals. The carriage requirements would also be subject to the one-third cap contained in the analog rules and exemptions for small systems.

Various other broadcasters made specific proposals for easing the implementation requirements of the must-carry principle or more generally endorsed a flexible approach to implementation. NAB, as well as MSTV, demonstrated that the continued growth in cable's channel capacity will make a DTV carriage requirement easily manageable in the aggregate. The implementation ideas submitted by MSTV and others assure that must-carry implementation can be managed sensibly and without hardship for all systems, whatever their particular circumstances, even in the near term.

The Commission should get on with the job.